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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. DENNLER, *et al.*,
Petitioners,

v.

ROBERT S. TRIPPET, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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1. In their brief in opposition, respondents[1] assert that this Court lacks jurisdiction to hear this case because the petition for a writ of certiorari was untimely because it "was not filed within 90 days after the entry of the judgment which finally resolved the issues raised by the petition" (Br. in Opp. 2, citing Sup. Ct. R. 13 and 28 U.S.C. § 2101). According to respondents, "the time for review of the Tenth Circuit's dismissal of the Section 11 claims began to run no later than the judgment of October 21, 1991, which clarified the July 22, 1991 dismissal of those claims" (*id.* at 5). This contention is frivolous.

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[1] Only respondents Cross, Cross & Company, Kothe & Eagleton and Kunkel have filed a brief in opposition. Respondents Trippet and Sims have filed no response to the petition for certiorari.

Respondents ignore the fact that petitioners filed a timely petition for certiorari seeking review of the Tenth Circuit's judgment of October 21, 1991, which raised issues with respect to *both* the claims under Section 10(b) of the 1934 Act *and* the claims under Section 11 of the 1933 Act.[2] On April 20, 1992, this Court issued an order granting the petition, vacating the judgment, and remanding the case to the Tenth Circuit "for further consideration in light of Section 27A of the Securities and Exchange Act of 1934." *Dennler v. Trippet*, 112 S.Ct. 1658 (1992). By granting the petition and vacating the Tenth Circuit's judgment without qualification, this Court necessarily vacated that judgment in its entirety—that is, the portion addressing the Section 11 issues as well as the portion addressing the Section 10(b) issues. Thus, the Tenth Circuit's judgment with respect to the Section 11 issues has never become "final" in any sense of the word.

It is well-established that this Court has jurisdiction to review an appellate court's decision rendered following a previous order granting certiorari, vacating the original appellate decision and remanding for reconsideration in light of intervening changes in the law. *See, e.g., Rush v. Savchuk*, 444 U.S. 320 (1980). And it is also clear that the scope of such a review is not limited to the grounds which were the basis of the appellate court's decision on remand. *E.g., Califano v. Yamasaki*, 442 U.S. 682 (1979).

In arguing that October 21, 1991, is the date from which the timeliness of petitioners' current petition for certiorari must be determined, respondents appear to be taking the position that this Court granted certiorari only with respect to the Tenth Circuit's ruling on petitioners' Section 10(b) claims and implicitly denied certiorari with respect to the balance of the Tenth Circuit's rulings (Opp. Br. 3) and, therefore, that this Court's action somehow consti-

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[2] *See* Petition For A Writ Of Certiorari, *Dennler v. Trippet*, No. 91-1340. That petition was filed on February 19, 1992, the date to which the time for filing had been extended by order of Justice White dated December 30, 1991.

tuted a final judgment on the merits against the validity of petitioners' Section 11 claims. There are at least three fallacies in that position. First, on its face, the Court's order neither denied certiorari on any issue nor limited its reversal of the Tenth Circuit's judgment in any way. Second, an order granting certiorari, vacating the judgment below and remanding the case for reconsideration does "not amount to a final determination on the merits". *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Thirdly, even if the Court had expressly denied certiorari in its earlier order, such a denial does not constitute a decision on the merits and does not prevent the Court from later granting certiorari on the same issues, so long as the case remains pending. *E.g.*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

There is no merit whatever to respondents' suggestion that this Court lacks jurisdiction because petitioners on remand from this Court did not request the Tenth Circuit to reconsider its prior Section 11 rulings. To begin with, the Tenth Circuit on remand directed the parties to file supplemental briefs "addressing the issue remanded to this Court by the Supreme Court"—namely, the Section 27A issue and no other issue (Order filed April 29, 1992). Moreover, the Tenth Circuit had previously rejected petitioners' argument on these issues and no intervening statutory change or judicial decision had occurred to support a request for reconsideration. In any event, it has been a long-standing general rule that this Court, when presented with a petition for writ of certiorari, has jurisdiction to consider all substantial federal questions presented in earlier stages of the litigation. *Urie v. Thompson*, 337 U.S. 163, 172-173 (1949). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 316 (6th ed. 1986).[3]

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[3] The three cases cited by respondents in support of their jurisdictional argument (Br. in Opp. 4) are completely inapposite. In all of them the issue was whether the time for petitioning for certiorari began to run upon the entry of an initial adverse appellate decision or, instead, from the later entry of an order clarifying or modifying a part of the original decision. In two, *Federal Trade Commission v. Minneapolis-*

In sum, respondents have wholly failed to demonstrate that this Court lacks jurisdiction to consider the validity of the Tenth Circuit's reversal of petitioners' Section 11 judgments. The Section 11 issues presented here were raised in respondents' initial appeal to the Tenth Circuit, in petitioners' petition for rehearing before that court, and in petitioners' prior petition for certiorari timely filed on February 19, 1992. Nothing has occurred in the intervening time which would deprive this Court of jurisdiction to consider these issues. In effect, respondents contend that this Court forever deprived itself of jurisdiction to review the Tenth Circuit's Section 11 rulings by summarily disposing of the case in April of 1992 rather than granting plenary review at that time. That contention has no support either in precedent or in common sense.

2.a. As to the first question presented, respondents' effort (Br. in Opp. 8-9) to harmonize the Tenth Circuit's ruling on "inquiry notice" with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), is wholly unpersuasive. Whether *Robertson* is characterized as involving fraudulent concealment of a single fraud or two independent frauds is immaterial. The key point is that the Second Circuit held in *Robertson* that the plaintiff's knowledge of an SEC action charging an

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Honeywell Regulator Co., 344 U.S. 206 (1952), and *Department of Banking v. Pink*, 317 U.S. 264 (1942), this Court held that the petition for certiorari was untimely because the second appellate decision was neither the product of a timely petition for rehearing nor a substantive change in the original decision. In contrast, in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), this Court held a petition for certiorari from a second court of appeals decision substantively modifying a portion of its initial decision to be timely. None of them involved an intervening decision by this Court vacating the initial appellate decision and remanding the entire case to the lower court. To the extent the three cases are relevant at all here, the decision in *Idaho Power*, which held that the time to petition for certiorari runs from the entry of a second appellate decision which substantively modifies the first, supports petitioners' position here because the Tenth Circuit made major substantive revisions in its initial decision in this case (reinstating petitioners' Section 10(b) judgments against respondents) following the remand from this Court.

issuer's underwriters with market manipulation of the issuer's stock did not constitute inquiry notice, as a matter of law, of a separate fraud committed in preparing the issuer's financial statements (609 F.2d at 592). In direct contradiction, the Tenth Circuit has held that petitioners' knowledge of an SEC action charging a narrow range of violations in connection with Home-Stake's 1970 program—all of which violations were purportedly cured in a later rescission offer (Pet. 6, 16)—constituted inquiry notice, as a matter of law, to all 1970-1972 Program investors that Home-Stake and its subsidiaries were operating a wholly distinct fraudulent scheme involving the preparation and dissemination of false financial statements during 1964-1972.[4] The conflict between *Robertson* and this case is clear.[5]

b. Respondents' defense of the Tenth Circuit's holding that petitioners were put on inquiry notice of the Home-Stake fraud on April 30, 1971, by the mailing of the rescission offer (App. 47a), is notable more for what it omits than for what it says. What is omitted (Br. in Opp. 9-13) is any attempt to refute petitioners' showing (Pet. 13-17) that a reasonable investor would have regarded the court-approved rescission offer as both identifying and curing the limited violations previously alleged by the SEC. In-

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[4] Respondents are disingenuous in contending (Br. in Opp. 8 n.4) that petitioners have changed their position as to the event—the second SEC suit against Home-Stake, as opposed to Home-Stake's bankruptcy filing—that triggered inquiry notice. Both events took place in September 1973; the bankruptcy filing resulted from settlement of the SEC action (T. 3472); and both events were reported in the Wall Street Journal several days apart (App. 28a; T. 1757, 1765-66). The jury did not determine which event put petitioners on inquiry notice, but simply found that petitioners could not have discovered the Home-Stake fraud "until September 1973" (App. 78a-146a).

[5] Respondents' citation of *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), as somehow supporting the Tenth Circuit's decision here is wholly inapposite. In fact, by relying in part on the bankruptcy of the securities issuer as imparting notice to the plaintiffs, 550 F.2d at 781, *Arneil* is consistent with the jury's selection of September 1973 as the notice date in this case.

deed, that is precisely what the jury determined in finding that petitioners lacked notice of Home-Stake's Ponzi scheme until September 1973.

Instead of confronting the Tenth Circuit's fundamental error in treating this issue as one of law, respondents argue disputed evidentiary points which were decided against them at trial and neither addressed nor relied upon by the court of appeals. For example, respondents' theory that petitioners gained "constructive knowledge" of the Home-Stake fraud from asserted inconsistencies between projections in program books and prospectuses, from information allegedly derivable from check stubs and tax summaries, and from a footnote in the 1971 prospectus (Br. in Opp. 10-11), was rejected by the jury in answering special interrogatories (App. 78a-146a) and by the trial court in its order denying respondents' statute of limitations defenses (App. 57a-59a). Most importantly, the Tenth Circuit did not discuss, much less rely on, any of this "knowledge" in holding petitioners' 1933 Act claims time-barred by the one-year limitations period of Section 13 (App. 43a-47a).

Respondents attack as "incredible" the jury's finding that petitioners should not have discovered the fraud until September 1973, noting that the *Anixter* class action was filed six months earlier (Br. in Opp. 12). This is a red herring. As the Tenth Circuit noted, the primary issue is whether the *Anixter* complaint filed on March 30, 1973 is time-barred (App. 39a-40a, 47a), not whether September 1973 rather than March 30, 1973 is the appropriate notice date. There was no evidence at trial that any class representative or any member of the 1970-1972 investor classes (apart from Ivan Anixter himself) had knowledge prior to September 1973 of the filing of the *Anixter* action.[6] Thus, the jury's finding that the 1970-1972 class

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[6] Ivan Anixter, the original named plaintiff in this case, voluntarily dismissed with prejudice his Section 11 claim against the only respondent affected by the issue whether March 30, 1973 or September 1973 is the applicable notice date (Doc. 2709). Similarly, there is no evidence

members should not have discovered their claims prior to September 1973 is both reasonable and consistent with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586, 591-92 (2d Cir. 1979) (plaintiff's knowledge of and involvement in prior action not determinative on notice issue).[7]

c. Respondents concede that, under the Seventh Amendment, an appellate court may properly reverse a jury verdict only where the material facts and the inferences to be drawn therefrom are either undisputed or point so strongly in favor of the appellant that reasonable persons could draw no other conclusion (Br. in Opp. 13-14). Moreover, in reviewing the evidence, this Court has held that courts of appeal are "bound to view the evidence in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

Even if one assumes *arguendo* the reasonableness of the inferences that the Tenth Circuit, in ruling against petitioners, drew from the 1971 SEC action and ensuing

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in the record of knowledge by any class representative or class member of the six prior suits against Home-Stake referred to by respondents (Br. in Opp. 12) and the Tenth Circuit did not rely on those suits in support of its ruling (App. 45a).

[7] The "additional defect" alleged by respondents to inhere in the claims first asserted by amendment in May 1974 by the 1971 class against respondent Kothe & Eagleton and by the 1972 class against respondent Cross & Company (Br. in Opp. 12) is only a variation on their "red herring" argument discussed in the text above. No 1971 or 1972 class representative or class member (other than Ivan Anixter who voluntarily dismissed his Section 11 claim against Kothe & Eagleton before trial) was shown to have any knowledge, or reason to know, of the March 30, 1973 filing of the *Anixter* action, or of the facts on which that action was based, prior to September 1973, as found by the jury (App. 129a, 131a). Accordingly, the Section 11 claims of those classes against Kothe & Eagleton and Cross & Company were timely when filed in May of 1974 under the one-year limitation period of Section 13.

rescission offer, respondents make no effort to show that the contrary inferences urged by petitioners (Pet. 15-17) are not ones that a reasonable jury could *also* draw. Absent such a showing, the Tenth Circuit's holding on the "inquiry notice" point constitutes a clear violation of the Seventh Amendment and of this Court's standards for appellate review of jury verdicts.

3. As to the second question presented, respondents contend that the doctrine of equitable estoppel does not apply here because its application is confined to situations where a defendant fraudulently induces a plaintiff to fail to file a known cause of action in a timely manner (Br. in Opp. 15-16). In so arguing, respondents seek to defend the Tenth Circuit's ruling on a ground different from that upon which the court itself relied. The court of appeals held that equitable estoppel is unavailable *per se* in any Section 13 case (App. 38a), not that the facts of this case do not warrant its application.[8]

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[8] Respondents assert that the "factual issues [relating to the application of equitable estoppel to the conduct of each respondent] were fully considered by the Tenth Circuit" (Br. in Opp. 19). This assertion is untrue. The Tenth Circuit neither discussed nor relied on any evidence of respondents' conduct in rejecting the trial court's application of equitable estoppel in this case (App. 32a-39a).

Respondents also assert (Br. in Opp. 17-18) that numerous circuits have rejected the application of equitable estoppel to Section 13, citing *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991). In fact, other than dictum in *Short* itself, none of the cases cited in *Short* involved the application of equitable estoppel in a Section 13 action. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308 (9th Cir. 1982) and *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982) both involved equitable tolling not equitable estoppel. And *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) and *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980), interpreting the substantially identical three-year limitations period contained in the Interstate State Land Sales Full Disclosure Act, 15 U.S.C. § 1711 (1976) (amended 1979), stated that equitable estoppel could apply in a proper case.

More importantly, neither respondents nor the authorities they cite[9] suggest any reason why the principle behind equitable estoppel—"that no man may take advantage of his own wrong," *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959)—should apply to revive a time-barred lawsuit where a plaintiff has been lulled into letting the statute of limitations run on a known cause of action, yet not apply where the plaintiff's failure to file a timely suit was procured by the defendant's active fraud in keeping the plaintiff ignorant of the relevant facts. In both situations the defendant has fraudulently obtained the benefit of a time bar by conduct separate and apart from the acts that gave rise to the original cause of action. Indeed, the defendant's fraud in the latter case seems more egregious because it is more complete: by keeping plaintiffs in the dark about the very *existence* of their cause of action, the defendant absolutely deprives them of any opportunity to sue. Neither the Tenth Circuit in this case nor the Seventh Circuit in *Short* has proffered any principled basis for invoking equitable estoppel in the circum-

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[9] Although citing Professor Bloomenthal for the proposition that the Tenth Circuit's rejection of equitable estoppel "is [sic] not inappropriate" (Br. in Opp. 18), respondents omit his subsequent statement that:

> Congress was not saying that a defendant by his own subsequent conduct could not extend the [three-year] period of limitations [in Section 13], and that is what the doctrine of equitable estoppel is all about. It is critical, however, to the application of such doctrine that it be triggered by something other than the events that constitute the basis for the claim for which Congress established the period of repose and that the triggering events reasonably caused the plaintiff to forbear asserting his claim . . . . The Tenth Circuit's decision in *Anixter*, as noted above, rejected the foregoing distinction.

H. Bloomenthal, *Securities Law Handbook* 1058 (1991-92 ed.)

Here the acts of fraudulent concealment committed by Home-Stake and respondents occurred subsequent to the filing of each misleading registration statement on which the Section 11 claims of each class were based and reasonably caused the class representatives and class members to forbear asserting their claims.

stances presented by *Glus*, yet not invoking that doctrine in circumstances like those here, which include a calculated pattern of fraud on the SEC and the district court which issued the 1971 consent injunction against Home-Stake, as well as on petitioners. *Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944) (vacating a final judgment for fraud on the Patent Office and on the court of appeals).[10] This Court should grant certiorari to make clear that its decisions in *Glus* and *Hazel-Atlas* are not so limited.

CONCLUSION

For these reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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[10] *See* the discussion of the breadth of the equitable estoppel doctrine in Symons, *Pomeroy's Equity Jurisprudence* §§ 802-805 (5th ed. 1941). The necessity for fraudulent acts by a defendant that are separate and apart from the initial misrepresentations in the sale of a security is the answer to the Seventh Circuit's rhetorical question about the necessity for the three-year bar to be absolute. *Short* at 1391, quoted at App. 38a. Where the one-year period of Section 13 has not run because the plaintiff has no basis for discovering a misrepresentation or omission, the three-year statute of limitations will protect any defendant who has not actively and fraudulently concealed the misrepresentation or omission. *See* Johnson, *Securities Fraud and the Mirage of Repose*, 1992 Wis. L. Rev. 607, 664 (1992).

Respectfully submitted,

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